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No. 85-637

IN THE

Supreme Court of the United States

October Term, 1985

DONALD P. HODEL, SECRETARY, DEPARTMENT OF INTERIOR, AND HIS AGENTS, ASSIGNS AND SUCCESSORS IN OFFICE,

Appellant,

v.

MARY IRVING, PATRICK PUMPKIN SEED, EILEEN BISCONETTE AS GUARDIAN FOR DUANE CROSS, ANTHONY CROSS, FAITH CROSS AND ALL OTHERS SIMILARLY SITUATED,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE YAKIMA INDIAN NATION, AS AMICUS CURIAE

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I.

INTEREST OF AMICUS CURIAE

The Confederated Tribes and Bands of the Yakima Indian Nation, herein referred to as the Yakima Indian Nation, is an Indian tribe located in the south central part of

the State of Washington. The Yakima Indian Nation's status as a sovereign entity was reserved in the *Treaty with the Yakimas,* which was executed on June 9, 1855, ratified on March 8, 1859, and proclaimed on April 18, 1859. (12 Stat. 951.) From lands exceeding ten million acres ceded to the United States, the *Treaty with the Yakimas* reserved the Yakima Indian Reservation. The Yakima Indian Reservation has a total area of 1,367,105 acres. Within said Yakima Indian Reservation, the Yakima Indian Nation owns 842,978 acres. Individual Indians are allotted 274,988 acres and the remaining 249,416 acres are held in non-trust or non-restricted title by others — mostly non-Indians.

Since 1955, under the Act of July 28, 1955, ch. 423, 69 Stat. 392, as amended by the Act of August 31, 1964, Pub. L. 88-540, 78 Stat. 748 (codified at 25 U.S.C. Secs. 608-608c), the Yakima Indian Nation has expended over fifty-five million dollars to purchase trust lands from allottees under a land consolidation enterprise.

Under Section 7 of the Act of August 9, 1946, ch. 933 Sec. 7, 60 Stat. 968 (codified as amended at 25 U.S.C. 607), the Yakima Indian Nation acquired the interests of allottees whose heirs did not possess the requisite blood quantum specified by this Act without compensation. *Simmons v. Eagle Seelatsee,* 244 F. Supp. 808 (E.D. Wash. 1965), *aff'd,* 384 U.S. 209 (1966). The above described Section 7 was amended by the Act of December 31, 1970, Pub. L. 91-627, 87 Stat. 1874, to provide allottees' heirs with compensation for the interests flowing to the Yakima Indian Nation. Congressional legislative history indicates that the basis for this amendment was that Congress considered the taking unfair. Senate Report No. 91-1384, 3 U.S. Cong. & Admin. News '70, p. 5783.

Under this amended Section (codified as amended at 25 U.S.C. 607), the Yakima Indian Nation has acquired, and is now purchasing, the interests of members and non-

members not possessing the necessary one-fourth blood quantum of the antecedent tribes and bands. This action provides for the consolidation of fractionated interests, fosters fair enrollment practices and provides fair compensation for these tribally-acquired interests. All without the internal disruption that results from these interests being acquired without compensation.

The Yakima Indian Nation's land consolidation and enrollment practices have promoted land consolidation, therby reducing federal expenditures regarding administration of fractionated interests in Yakima Reservation allotments. As the Government has noted, reduction of federal expenditures is a primary purpose of Section 207 of the Land Consolidation Act, 25 U.S.C. 2206, and Section 207 of the Act of October 30, 1984, Pub. L. 98-608, 98 Stat. 3173, (25 U.S.C. 483a). Jurisdictional Statement pp. 7, 22 n.5. The Government appeal goes even further and notes that "[t]he legislative history of Section 207 strongly reflects Congress' intention that the Act not result in any cost to the United States." The Government's presentation is a clear showing that Section 207 lacks any real tie to the trust obligation of the United States.

The Yakima Indian Nation's land consolidation plan operating under the foregoing federal laws relating to the Yakima Indian Nation, codified at 25 U.S.C. Sections 607, 608-608c, fosters consolidation and further provides that the heirs receive compensation for tribally-acquired interests. The provisions now before this Court in 25 U.S.C. 2206, save the United States monies involved in administering fractionated interests; but these provisions do so arbitrarily and in violation of the United States' fiduciary responsibility, thus unconstitutionally placing the entire financial burden of this federal saving on individual Indians. It is this effect of 25 U.S.C. 2206 on the members of the Yakima Indian Nation and other Indians that the Yakima Indian Nation opposes and is the reason that the Government's appeal is opposed in this brief.

II.

ARGUMENT

The holding of the Court of Appeals for the Eighth Circuit is correct. The Constitution itself dictates respect for settled economic arrangements by banning legislation that impairs contractual arrangements or takes property without just compensation. Although the protection of settled economic arrangements from federal legislation is not explicity within the Contract Clause, the Due Process Clause of the Fifth Amendment has much the same effect. *See Lynch v. United States,* 292 U.S. 571 (1934). The protection that settled economic arrangements receive regards taking without compensation is explicit in the final clause of this Fifth Amendment. The Court of Appeals, like this Court, knows a taking when it sees it and was not impressed by the Government's emphasis on de minimus. This Court should affirm. *See Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982).

Transcending the Court of Appeals' determination of an uncompensated taking, the holding of the Court of Appeals should be sustained regardless of the existence or non-existence of vested property interests or their taking.

Inherent in the Court of Appeals holding 25 U.S.C. 2206 unconstitutional is this Court's requirement that the constitutional legislative power of Congress — regarding Indian property — must be tied rationally to the trust obligations of the United States. The record in this case shows just the opposite. The United States and Congress have breached any fiduciary responsibility. Their conflict of interest is recorded and overpowering. The unilateral placing the cost burden of consolidation for the financial benefits of consolidation flowing to the trustee on these Indian wards is contrary to this fiduciary relationship and is impermissible. Legalisms abound in the decisions below and in the Government's opening brief; but underlying the sec-

tion under attack is the bottom line that Congress abused the trust responsibility to Indians that is the basis of its legislative power over alienation of the trust properties involved.

This guardian-ward relationship was first noted by this Court in *Cherokee v. Georgia,* 30 U.S. (5 Pet.) 1 (1831). This Court has continued to construe statutes under this indisputable existence of a general trust relationship between the United States and the Indian people. *United States v. Mitchell,* 463 U.S. 206, 225 (1983).

Indeed it is this guardianship theory that this Court distinctly relied upon as the basis for congressional power over Indians. *United States v. Kagama,* 118 U.S. 375 (1886). While this Court has not cited trust responsibility as the sole source of congressional power since *United States v. Candelaria,* 271 U.S. 432 (1926), this Court has made it clear that the constitutional standard for judicial review of Indian legislation is whether the legislation under attack serves this fiduciary responsibility. *Delaware Tribal Business Community v. Weeks,* 430 U.S. 73, 83-85 (1977).

In *Delaware Tribal Business Community v. Weeks, supra,* this Court rejected arguments seeking to establish that the power of Congress is so pervasive as to render its legislation not subject to judicial consitutional review. Instead, this Court held that the constitutional standard for judicial review was whether the legislation under attack was "tied rationally to the fulfillment of Congress' unique obligations towards Indians". 430 U.S. at 85. Where Congress is exercising its authority over Indians rather than some other distinctive power, this trust obligation requires that its statutes be based on a determination that the Indians will be protected. Otherwise, such statutes are not rationally related to the trustee obligation. *United States v. Sioux Nation,* 448 U.S. 471 (1980). The trustees' conflict in the instant case is obvious.

Under the admitted facts of the attacked escheat section enactment, Congress did not make good faith efforts to protect its Indian wards and see that they receive full value and be free from the burden of unfair restrictions. This is the approved test of this Court in *United States v. Sioux Nation, supra.* It is clear that Congress was more interested in reducing administrative obligations of the United States than in protecting its wards. In other words, Congress was looking out for the interests of the United States, not those of its wards. Requiring that compensation be given for the interests flowing to the tribes would have been very easy for Congress to do. Congress has so provided in the legislation regarding interests flowing to the Yakima Nation under land consolidation legislation pertaining to the Yakima Reservation. 25 U.S.C. 607. The Government describes the interests that are lost as de minimus. If they are so de minimus, tribes could readily provide funds for adequate compensation. Further, there was no showing that Congress could not, in its own as well as its wards' interests, provide funds for acquisition to reduce administrative costs that was so clearly the primary goal of Congress. In the enactment of 25 U.S.C. 2206, Congress was fostering the interests of the United States, not its Indian wards.

III.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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